IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No 1392

CHRIS. CHRISTIANSEN ET AL.,

VS.

MARGARET CHRISTIANSEN.

PETITION FOR CERTIROARI AND SUPPORTING BRIEF

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SUBJECT INDEX

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To the Honorable, The Supreme Court of The United States:

Come now your petitioners, Chris. Christiansen, Alfred Carter, Ella Hansen, Fritz Carter, Albert Myhre, Elmer Myhre, Myrtle Myhre Schanche, Lester Schanche, Mavis Y. Dotzauer, Cyril Dotzauer, Judith Carter, individually and as Guardian of the persons and estate of Darlene I. Carter, Kenneth Carter, Donold G. Carter and Tellef Edwin Carter, who are hereinafter styled Petitioners, and, applying for a Writ of Certiorari to

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the United States Circuit Court of Appeals, for Fifth Circuit, respectfully show:

STATEMENT OF THE CASE

This suit was filed in the United States District Court of the Northern District of Texas, at Dallas, by Margaret Christiansen, as Plaintiff, against Chris. Christiansen and the other parties hereinabove named, as Defendants, and arose in this manner:

There were originally four Christiansen children, all of whom lived in the then Territory of Dakota with their parents, two sons, Gilbert and Chris, and two daughters, Johanna, who married Carter, and Allette, who first married Logan and, after his death, married Sullivan. Johanna remained in Dakota where she subsequently died, and all of the petitioners herein other than Chris Christiansen are her heirs at law.

Gilbert Christiansen moved out to Oregon and married and raised a family, maintaining his home at Astoria. There were three children born to him by this marriage; Annie, Josie and Alfred. Annie came to Dallas to visit her uncle Chris. Christiansen and her Aunt Allette Logan about 1894 and died there without leaving bodily heirs. (Tr. 133).

About 1900 Gilbert Christiansen separated from his wife and children, Josie and Alfred, went to Tacoma,

Washington, and then came to Dallas, Texas, where he resided with his brother, Chris Christiansen, died about two years later and is buried in Dallas beside his daughter, Annie. After he left his wife and children neither Gilbert Christiansen nor Chris. Christiansen nor any of the other relatives ever heard from any of Gilbert's family.

The evidence shows that Carrie Christiansen, Gilbert's surviving wife, and his two children, Josie and Alfred, moved away from Astoria soon after Gilbert left them, but never communicated their whereabouts to any of their relatives, though they knew that Chris and Allette lived in Dallas, Texas. (Tr. 59). The evidence shows that Alfred Christiansen, son of Gilbert Christiansen, married Margaret, the Plaintiff herein, and they had no children; that his sister, Josie married Bergeron and that she is dead, but there is no evidence anywhere in the record showing what children she left, or showing that Margaret Christiansen is the sole and only heir at law of Gilbert Christiansen, deceased. She never established anywhere that she is the sole heir at law of said Gilbert Christiansen, and as such entitled to recover any interest he might have had in this property.

A suit was instituted in the 44th District Court of Texas, at Dallas, by Chris. Christiansen and his sister, Johanna Carter, in 1934, alleging death of their sister, Allette Sullivan, and their claim against her surviving husband, J. A. Sullivan, and the heirs, if any, of Gilbert

Christiansen, deceased, Carrie Christiansen, Alfred Christiansen, Josie Christiansen and Annie Christiansen, residence unknown, if living, and against their heirs, if they be dead, all of whom were properly cited by publication. Upon trial of that cause, judgment was entered decreeing all of the defendants, except J. A. Sullivan, dead, under presumption of death because of more than 7 years absence, and partitioning the property between Chris. Christiansen and Mrs. Johanna Carter, brother and sister of Allette Sullivan, deceased, and her surviving husband, J. A. Sullivan. This judgment became final in April, 1934. The evidence shows Chris. Christiansen has ever since that date and time held continuous possession of all of said property decreed to him and his sister, as heirs of Allette Sullivan, occupied same by tenants, collected rents, made valuable and permanent improvements, paid all taxes currently each year and exercised all attributes of ownership. (Tr. 116-126)

On July 23, 1945, more than eleven years thereafter, suit was filed by Margaret Christiansen in the United States District Court, Northern District of Texas, at Dallas, against the petitioners herein, alleging that Alfred Christiansen was not dead, but alive, at the date of rendition of the judgment in the 44th District Court in 1934, that he did not die until 1940, that she was his sole and only heir at law, and seeking judgment for one-third of the properties adjudicated to Chris. Christiansen and Johanna Carter in that District Court judgment, together with interest and damages. (Tr. 2-14)

Petitioners, as defendants in that siut, answered by pleading the judgment in the District Court of Dallas County as a final judgment, not subject here to collateral attack, and also pleading all of the various statutes of limitation of 2, 3, 4, 5 and 10 years in defense thereof. (Tr. 14-18)

Upon trial of this cause, the Court found that petitioners herein were entitled to recover upon their pleas of limitation, same being established and so adjudicated. (Tr. 49-51, 235-239)

Margaret Christiansen appealed from that judgment to the United States Circuit Court of Appeals, Fifth Circuit, where that Court by divided opinion held that the petitioners here, were not entitled to recover upon their pleas of limitation, holding, in effect, that what is generally known as "The Dead Man's Statute", art. 5541 of the Revised Civil Statutes of Texas, was not subject to the laws of limitation, and that the parties taking thereunder took the property burdened with the right of the party who had been adjudged dead to recover his property, if in fact he was not at such time dead, regardless of the lapse of time and regardless of all other statutes and rules of law. (Tr. ———)

There was an able dissenting opinion rendered in that case in the United States Circuit Court of Appeals holding Art. 5541 subject to all the limitation statutes and approving the decision of the Trial Judge to that effect. (Tr. ———)

The Opinion and decision of the Honorable United States Circuit Court of Appeals was rendered on January 2[illegible], 1947, and motion for rehearing filed therein by the appellees, which was overruled without written opinion on March 12, 1947. (Tr. 250)

All of the various Articles of the Texas Statutes on Limitation, including Art. 5541, are copied and contained in the supporting brief of petitioners hereto attached at page 25-26 thereof, to which reference is here made.

And it is herenow submitted, and urged as the basic ground for this petition, that the Judgment of the Trial Court and the dissenting Opinion of Judge Sibley are both correct and supported by the Laws and Decisions of the State of Texas; that the majority opinion and decision of the United States Circuit Court of Appeals is contrary to the Laws and decisions of the State of Texas, and is in error, on account of which this Petition for Writ of Certiorari should be granted and this cause correctly decided.

STATEMENT AS TO JURISDICTION.

Jurisdiction is conferred upon the Supreme Court herein by Section 240 of the Judicial Code, as amended, being Title 28, Section 347, United States Code Annotated.

The opinion of the United States Circuit Court of Appeals is a part of the transcript of the record accompanying this petition for certiorari.

QUESTIONS PRESENTED.

There is but one basic, primary question presented herein, and that is whether or not Art. 5541 of the Revised Civil Statutes of the State of Texas which is a part of Title 91 on Limitations, is subject to the provisions of that Title, or whether, as a majority of the Honorable Circuit Court of Appeals hold, it is by its terms lifted out of that title on Limitation and not subject thereto or governed thereby.

Art 5541, above, is as follows:

> "Art. 5541. Presumption of Death. Any person absenting himself for seven years successively shall be presumed to be dead, unless proof be made that he was alive within that time; but an estate recovered on such presumption, if in a subsequent action or suit the person presumed to be dead shall be proved to be living, shall be restored to him with the rents and profits of the estate with legal interes during such time as he shall be deprived thereof."

The trial Court having found that appellees, petitioners here, had acquired and held the property involved for the time and in the manner required by the Laws of Texas to perfect their limitation thereto, as against the plaintiff below, respondent here, that finding was conclusive (Tr. pgs. 235-239).

The opinion of the majority of the United States Circuit Court of Appeals, in reversing the decision of the Trial Court holds only two things:

First, that there would have had to be repudiation of any holding under the judgment of the 44th District Court under Art. 5541, and actual notice to Alfred Chritiansen thereof, in order to start limitation in favor of these petitioners; and

Second, that Art. 5541 imposes upon a party taking thereunder the legal effect of taking such property burdened with the requirement that he restore the same to the party decreed to be dead if, in fact, it be thereafter established that such party was not in fact dead at the time of such decree, regardless of all the statutes of limitation.

The dissenting opinion in said United States Circuit Court of Appeals, ably rendered by Judge Sibley, holds that Art. 5541 was subject to all the provisions of the title on limitations, and that these petitioners perfected their title by limitation herein.

It is respectfully submitted on behalf of petitioners here that with regard to said Art. 5541 and its effect in this case, anyone seeking to recover property affected by a decision under said Article is governed by all other provisions of the laws of Texas, and especially by the provisions of the remaining Articles of the Title on Limitations, being Title 91, of which said Art. 5541 is a part.

And, further, that, regardless of said Art. 5541 and of any suit or judgment had thereunder on in which the same might have been involved, a party could perfect limitation

to the property involved in such judgment independently thereof; and that, petitioners herein having entered into possession of said property, and having openly and notoriously held the same and met all of the requirements of the Statutes of Limitation to perfect their title thereto, irrespective and independent of said Art. 5541 and of said judgment, they did perfect an independent title in themselves by limitation, and of which respondents had such notice as the law requires.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1.

The opinion and decision of the majority of the United States Circuit Court of Appeals is in direct conflict with the decisions of the Supreme Court of Texas with regard to the laws of limitation and their application to this case: the Court below holding that because of the existence of Art. 5541 of Texas Civil Statutes giving the right of recovery to one who was not actually dead at the time he had been so adjudged exempts such right in him from control of all laws and statutes of limitation, whereas, the Supreme Court of Texas has held that when a person has perfected his title by limitation the same is vested in him with full title from the sovereignty of the soil, precluding all claims, and is good against all the world. (Burton vs. Carroll, 96 Texas Supr. 320, 72 SW 582; Latta vs. Wiley, 92 SW 438). The decision of the court below is not sup-

ported by precedent or decision of any kind, and is in conflict with adjudicated determination of this question and is error, for which this Writ of Certiorari should be granted.

2.

Art. 5541 being a part of Title 91, on Limitations, in the Revised Civil Statutes of Texas, is governed by the remaining Articles of that Title, and when any party has perfected his title to lands by limitation in virtue of any of the articles of that title, then such title so thus perfected is good in him as against any claims under Art. 5541, and it was Error for the Majority of the United States Cirsuit Court of Appeals to hold otherwise.

3.

The trial Court having found that petitioners Chris. Christiansen et al., had perfected their title to the properties involved by limitation as against the claims of Margaret Christiansen, such finding as to limitation is conclusive on appeal upon the United States Circuit Court of Appeals and that Court was bound thereby; and it was error to hold otherwise.

4.

The trial Court having found that Margaret Christiansen had consrtuctive notice of the holding of petitioners herein, and that same was sufficient upon which to predi-

cate title by limitation, such finding was binding on the United States Circuit Court of Appeals, (and binding on this Honorable Court), and it was error to hold otherwise.

5.

The substance of Art. 5541, generally known as "The Dead Man's Statute", being incorporated in the Statutes of many States of this Union, and the exact question involved here, as to whether one holding by limitation as against any right of recovery under said statute, can perfect his title by limitation superior to such purported right of any party disseized under said statute, not having been directly passed upon by any Court, either State or Federal, the same is of such great and general importance to the Courts and property owners of this Nation as to present a question of such gravity that it should be definitely determined by this Honorable Supreme Court.

6.

The opinion of the Honorable United States Circuit Court of Appeals is to the effect that in order to predicate limitation in favor of these petitioners, it was necessary that actual notice should have been given by them to said Alfred Christiansen personally or to respondent herein of such holding adverse to them; which decision is contrary to and in conflict with the decisions and laws of the State of Texas, wherein this property is situated and where-

in this cause was tried, relating to the question of land law involved herein, in this: that the Supreme Court of Texas has held in unbroken line of decisions that actual notice as between co-tenants or tenants in common is not necessary to start the running of the statutes of limitation, but that limitation can be perfected in such cases where there has been an adverse open and notorious holding of such premises, in conformity with the requirements of the statutes, of such a nature that the party claiming record title to said property knew or by the exercise of reasonable diligence could have known thereof. (Cryer vs. Andrews 11 Texas Sup. 170.)

7.

There are many other states, besides the State of Texas, which have a like statute as that under consideration here, being said Art. 5541, and the question of the rights and effect of limitation with regard thereto does not appear to have been by any Court decided and applied, but the great weight of authority is to the effect that limitation once perfected under the requirements of limitation statutes gives and vests good title in the limitation holder against all the world, including one claiming under said dead man's statute.

8.

Said decision is contrary to the great weight of authority of the Courts of the State of Texas, where it is made to apply, in this: the Courts of Texas have held clearly

and definitely that title perfected by any of the statutes of limitation is a full, complete title, precluding all other claims to the property, and such limitation title vests in such limitation holder all title eminating from the sovereignty of the soil; and contrary holding of said United States Circuit Court of Appeals herein is error.

9.

The determination of the matters involved herein is of such gravity and general importance as to affect large and valuable properties, and this Writ of Certiorari should be granted as prayed for in order that substantial justice may be done, and the question at issue herein determined by this Honorable Court.

10.

Wrong and injustice will be suffered by petitioners, unless this Writ as prayed for be granted, because the decision of the Honorable United States Circuit Court of Appeals herein is both contrary to law and also deprives and takes from them their entire properties and inheritance, together with all their labors and expenditures thereon, in contravention to the laws and decisions of the Courts of the State of Texas; and this application has been made herein without unreasonable delay.

11.

The question involved herein is a question of land law applicable to titles in the State of Texas and the repose of such titles is vested in the Laws of Limitation as contained in its statutes being Title 91 thereof and construed in the decisions of its Courts; and same has been held to vest in a party holding limitation in conformity thereto, as petitioners do in this case, full and complete title, eminating from the sovereignty of the soil, against all the entire world; and that includes parties claiming under said Art. 5541; and the decisions herein sought to be reviewed is directly in conflict with the statutes and decisions of the State of Texas applicable herein, and where this property is situated.

12.

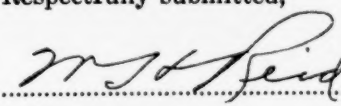
By reason of the fact that thousands of acres of land in Texas and multiplied millions of dollars in investments therein and thereon have passed through like title as that here involved and will be directly affected by the decision hereof, the proper determination of this cause is of such great importance that it should be herenow determined and writ granted herein.

PRAYER FOR WRIT OF CERTIORARI

Wherefore, your petitioners do pray that a Writ of Certiorari issue to the Honorable United States Circuit Court

of Appeals, for the Fifth Circuit, commanding it to certify to this Supreme Court for its review and determination on a day certain, a full and complete transcript of the record and proceedings in its Cause No. 11562, pending in said Court, styled Margaret Christiansen vs. Chris. Christiansen et al., and that the judgment of said United States Circuit Court of Appeals, as rendered and filed in said Court on January 22, 1947, together with its further order and judgment denying the petition for rehearing therein, on March 12, 1947, be in all things set aside, and that petitioner have such other and further relief in the premises as this Honorable Court may deem proper.

Respectfully submitted,



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

CHRIS. CHRISTIANSEN ET AL., *Petitioners*,

VS.

MARGARET CHRISTIANSEN, *Respondent*

SUPPORTING BRIEF

To the Honorable, the Supreme Court of the United States:

1.

OPINION OF THE COURT BELOW.

The opinion of the Honorable United States Circuit Court of Appeals, Fifth Circuit, was rendered and entered on January 22, 1947, and its order overruling the petition and motion for rehearing was rendered and entered on March 12, 1947, and copies thereof appear in the Transcript of the Record herein.

STATEMENT AS TO JURISDICTION.

Jurisdiction is conferred upon the Supreme Court herein by Section 240 of the Judicial Code, as amended, being Title 28, Section 347, United States Code Annotated.

The opinion of the United States Circuit Court of Appeals is a part of the transcript of the record accompanying this petition for certiorari.

STATEMENT OF THE CASE

We do hereby adopt the statement made in the foregoing Petition for Certiorari as a part of the statement and, to save repetition, do not restate it here; and we do make the following additional statement:

The evidence shows that Alfred Christiansen and his wife, Margaret Christiansen (respondent herein) both knew that Alfred had an uncle, Chris. Christiansen, and an aunt, Allette Sullivan, both of whom lived in Dallas and he spoke of them and that they lived in Dallas (Tr. 59); that his father and his sister had come to Dallas and were buried there; (Tr. pgs. 133-134) And it is further shown that neither Alfred Christiansen nor Margaret Christiansen ever at any time made any inquiry about their relatives in Dallas or about their property or did any other act or thing with regard thereto, until she brought this suit, more than 11 years after death of her aunt, Allette.

It is not shown that Chris. Christiansen or any other of these petitioners ever did anything of any kind or character to conceal their occupancy, claim to and adverse possession of said property, but on the other hand it shows that for more than 11 years before filing of this suit, these petitioners held same openly, adversely and notoriously, and this was so found by the Honorable Trial Judge to the effect that they had "Had it all the time, he has been improving it all the time, lived in it, a large part of it, and bought it and the deeds are here." (Tr. pg. 204)

Possession is clearly shown ever since April, 1934, and unbroken limitation established in petitioners by the testimony of Chris. Christiansen (Tr. pg. 150), and of Chris. Christiansen, Jr., (Tr. pgs. 226-227); Payment of taxes regularly by petitioners for every year from 1934 through date of trial (Tr. pg.s 205-211, inclusive); collection of rents from tenants occupying said properties from 1934 to date of trial (Tr. pgs. 221-222); and payment of expenses and upkeep and repairs on all of said property continuously for more than 11 years prior to filing of this suit (Tr. pp. 228-229)

SPECIFICATIONS OF ERRORS

1.

The opinion and decision of the majority of the United States Circuit Court of Appeals is in direct conflict with the decisions of the Supreme Court of Texas with regard

to the laws of limitation and their application to this case: the Court below holding that because of the existence of Art. 5541 of Texas Civil Statutes giving a right of recovery to one who was not actually dead at the time he had been so adjudged exempts such right in him from control of all laws and statutes of limitation; whereas, the Supreme Court of Texas has held that when a person has perfected his title by limitation the same is vested in him with full title from the sovereignty of the soil, precluding all claims, and is good against all the world. (Burton vs. Carroll, 96 Texas Supreme 320, 72 SW 582; Latta vs. Wiley, 92 SW 438). The decision of the court below is not supported by precedent or decision of any kind, and is in conflict with adjudicated determination of this question and is error, for which this Writ of Certiorari should be granted.

2.

The United States Circuit Court of Appeals erred in holding that the decision and judgment of the 44th District Court of Dallas County, Texas, finding Alfred Christiansen dead and decreeing title to his interest in the property involved unto the other heirs of Allette Sullivan, deceased, was not such a notorious act of ouster as to afford the basis upon which to predicate running of the statute of limitations.

3.

The United States Circuit Court of Appeals erred in holding that the judgment rendered in the 44th District Court of Dallas County, Texas, together with the other acts of limitation as shown by the evidence did not establish limitation in favor of the petitioners herein.

4.

The United States Circuit Court of Appeals erred in holding constructive notices of the taking and holding of the property involved by petitioners could not be established without giving actual notice thereof to Alfred Christiansen; constructive notice having been fully established by the evidence herein.

5.

The United States Circuit Court of Appeals erred in holding that where suit was brought under Art. 5541 of the Texas Civil Statutes, and judgment obtained and recorded that a party was then dead, the adverse party taking under such judgment held the property subject to be restored unto the one declared then dead at any time thereafter, should it be established that he was not in fact dead at the time of such judgment, and that same would have to be restored regardless of lapse of time and perfection of limitation under the Statutes of Texas relating thereto.

6.

The judgment of the Trial Court holding that limitation had been established in petitioner herein to the property involved, vesting in them title thereto as against the claims of the plaintiff, respondent here, such finding was correct and proper, and it was error for the United States Circuit Court of Appeals to hold contrary thereto.

7.

The Honorable United States Circuit Court of Appeals erred in its decision herein wherein it holds that because of the rendition of the judgment in the 44th District Court under the provisions of Art. 5541, the said Chris. Christiansen and his sister took thereunder burdened with and conditioned and contingent upon Alfred Christiansen being really then dead, and on that account their holding of said property was not hostile and adverse, but subordinate to and in recognition of the title of Alfred Christiansen if then alive, so that they could not by any means perfect limitation to their title to said property under any other provisions of law; because they had taken possession of said property immediately after such judgment in 1934, and they had ever since held the same and had perfected a complete limitation title thereto, irrespective of the judgment in said 44th District Court.

8.

The Honorable United States Circuit Court of Appeals erred in its holding and decision herein in holding that because it construed the acts of the petitioners herein in taking title under said Art. 5541 to be fraudulent as a matter of law. they could not hold or perfect their title to such property by any character of limitation or adverse holding to said Alfred Christiansen or his heirs, because under the decisions of the Courts of the State of Texas, where this property is situated, all actions and claims predicated upon fraud are completely barred within four years after the parties asserting such fraud discovered the same or by the exercise of reasonable diligence could have discovered it; and the evidence in this case showing conclusively that the holding of said property by petitioners Chris Christiansen et al., was open and notorious and of such a character that Alfred Christiansen could easily by the exercise of any diligence have discovered the same and also showing that said Alfred Christiansen and those claiming under him exercised no diligence of any kind or character whatsoever, notice of such alleged fraud would be imputed to them, and their right to recover on that account was fully and completely barred by the four years statute of limitations of the State of Texas, being Article 5529 of the Revised Civil Statutes of the State of Texas.

9.

The Honorable United States Circuit Court of Appeals erred in holding that Chris. Christiansen and his sister, Mrs. Carter, and those holding under them could not have acquired and perfected their title to the property involved herein independent of the judgment in the 44th District Court, but only under said Art. 5541, taking the same burdened with the requirement of returning it to Alfred Christiansen or his heirs, should he be proven not to have been dead at the time of rendition of said judgment, irrespective of their adverse holding under any other provisions or theory of the law; because, the evidence shows that Chris. Christiansen and his sister, Mrs. Carter, entered into possession of said property in May, 1934, and held the same in open, notorious and hostile possession, and perfected their limitation thereto, for more than eleven years before said Margaret Christiansen instituted this suit herein, and they thereby acquired and perfected complete independent title by limitation to said property irrespective of the existence of said judgment in the 44th District Court.

ARGUMENT.

By all of these acts, their open, exclusive and notorious possession of said property was shown without dispute for more than eleven years continuously before the filing of this suit, establishing limitation in them.

Determination of the issues of law in this case should be in accord with the decisions of the State of Texas, where this property is situated.

The Law of Limitations of the State of Texas is embraced in Title 91, embracing Articles 5507 to and including Art. 5546, Texas Revised Civil Statutes, and the pertinent Articles there, applicable in this case are as follows:

"Art. 5507—Three Years Possession.

Suit to recover real estate as against a person in peaceable and adverse possession thereof under title or color of title, shall be instututed within three years next after the cause of action accrued, and not thereafter."

"Art. 5509—Five Years Possession.

"Every suit to recover real estate as against a person having peaceable and adverse possession thereof, cultivating, using and enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instuted within five years next after cause of action shall have accrued, and not afterwards."

"Art. 5510—Ten Years Possession.

"Any person who has the right to action for recovery of lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoyeng the same, shall instutute his suit therfor within ten years next after his cause of action shall have accrued, and not afterwards."

"Art. 5513—Title by Possession.

"Whenever an action for the recovery of real estate is barred by any provision of this title, the person having such peaceable and adverse possession shall be held to have full title, precluding all claims."

Following these Articles are others explaining "Peaceable" and "Adverse" possession, and dealing with other matters affecting limitation not applicable here.

"Art. 5529—All Other Actions Barred, When.

"Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall bebrought within four years next after the right to bring the same shall have accrued and not afterward."

Art. 5541, being the one generally known as "The Dead Man's Statute" is as follows:

"Art. 5541:—Any person absenting himself for seven years successively shall be presumed to be dead, unless proof be made that he was alive within that time; but an estate recovered on such presumption, if in a subsequent action or suit the person presumed to be dead shall be proved to be living, shall be restored to him with the rents and profits of the estate with legal interest during such time as he shall be deprived thereof."

Under the Common Law, there were no Statutes of Limitation, but such matters were determined by laches, stale demand and estoppel.

Under the Spanish System of Jurisprudence, peculiar to the State of Texas and seven or eight other states, the matters were not left to speculation but were fixed by definite Acts or Articles of Limitation. Texas was originally a part of Spain, and the above quoted Articles are almost verbatim copied from the Decrees of the Kingdom of Spain, controlling over Texas from 1520 to 1810, when Mexico rebelled against Spain and became an independent nation. Mexico promptly enacted a "Law of Limitation" embracing all of the foregoing statutes. In 1820 the "State of Coahuila and Texas" was created and enacted these same articles of the statutes. In 1836, Texas became a Republic in its own right, and at first repealed all the limitation laws of Coahuila and of Mexico, but later, in 1841, the Congress of Texas, by act approved February 5, 1841, re-enacted these laws of limitation relating to the "repose and quiet of titles", comprising our present articles relating to 3, 5 and 10 years limitation, and also Art. 5541, in practically their exact present language. That was denominated by its enacting clause "An Act of Limitations", and Art. 5541 was included therein.

In the final Section 25 of that act of 1841, we find the following significant language:

> "This act shall not be construed to prejudice the claims of those to real estate that would have been quieted at an earlier time by Section 12—and this section shall be considered to continue in full force, wherever it would quiet titles to land at an earlier

period than this act." (Gammell's Laws of Texas, Vol. 2, pages 627-634.)

These same Articles in exact language, were re-enacted into the Statutes of Texas in 1846, when it became a State of United States of America, and all of them have continued in force and effect ever since.

The trial Court, after full hearing of this cause, concluded from the evidence that the defendants, petitioners here, had established title to said properties by limitation, and so found in their favor. (Tr. 235-239)

The United States Circuit Court of Appeals, by its majority opinion, reversed the judgment of the trial Court and held:

1.—That the acts of these petitioners in obtaining the judgment in the 44th District Court were a fraud upon Alfred Christiansen, and on that account they obtained no title as against him, and no limitation could run in their favor, except upon showing of actual notice to him.

2.—That by reason of said Art. 5541 having been invoked in the decree in the 44th District Court any taking thereunder by these petitioners "was not hostile and adverse, but was subordinate to, and in recognition of, the claims of Alfred, if alive," and therefore, not subject to their pleas of limitation, but was a holding for Alfred.

3.—That, regardless of the fact that these petitioners proved a clear and undisputed compliance of the laws and

statutes of limitation in such manner and for such length of time as to perfect their title thereunder, they could not recover or hold title to this property upon such limitation, independent of and without regard to said Art. 5541.

No fraud was established or shown, either as a matter of law or of evidence, upon the trial of this cause. This is ably discussed and shown in the dessenting opinion of Judge Sibley. (Tr. pg. 265)

But, should it be conceded, for the sake of argument, that there was evidence of fraud in such judgment of 44th District Court, then the parties affected thereby were required to bring their suit within four years after their cause of action accrued, and not afterward, under Art. 5529, supra.

It has been held by the Courts of Texas, in an unbroken line of decisions, that the four years statute of limitations applies to all actions for fraud, and limitation runs against same from the time such fraud was discovered or by the exercise of reasonable diligence could have been discovered.

Note 31, under Art. 5529, Vol. 16, page 568, of Vernon's Texas Civil Statutes gives a concise briefing of this question and the decision of Texas Courts. It is summed up thus:

> "Limitation begins to run on action for fraud from the time of the discovery of the fraud, or from the time it could have been discovered by reasonable dili-

gence. *Conrads—vs—Kasch*, 26 S. W. (2) 732, error refused by Supreme Court and cases there cited."

In *Glenn vs. Steele*, 61 SW (2) 810, cited by respondents in their brief on appeal below on the questions of trusts, resulting trust and fraud, the rule as to same is stated to be " that limitation begins to run from the time of the discovery of the fraud, or from the time it might have been discovered by the use of reasonable diligence."

Respondents plead that the judgment in the 44th District Court had been obtained by fraud, that it became final in April, 1934, but they nowhere plead or attempted to prove any diligence used by them whatever to discover the existence of such judgment, or why, by the exercise of reasonable diligence they could not have discovered the same. (Tr. 2-14)

Art. 5541 is clearly a part of the statutes constituting and embraced in Title 91 of Limitations. It has been such through many changing forms of government for more than 400 years. It has many times been enacted and reenacted as a part of that Title on Limitations.

This issue is fully discussed in Appellees Motion or Petition for Rehearing, Tr. pgs. ....., and attention is here called to the decisions there cited, in which it is clearly held that all acts constituting part of an existing scheme of legislation, and especially those passed at the same time or on the same day (these acts were) should be so

construed together as to harmonize and give force and effect to the provisions of each.

We do respectfully cite the following authorities supporting this well defined and determined principle of law:

59 Corpus Juris, Page 1053, par. 622, and cases cited.

39 Texas Jurisprudence, Page 168, par. 90, and cases there cited.

Austin vs. G. C. & S. F. Ry. Co., 45 Texas Supreme 234.

Bishop vs. Houston Ind. School Dist., 29 S. W. (2) 313, Texas Supreme Court.

Lovett vs. Simmons, 29 S. W. (2) 1022 Texas Supreme Court.

Stark vs. Caison, 50 S. W. (2) 776, Texas Supreme Court.

It is clear that whatever rights Alfred Christiansen had under Art. 5541 with regard to said judgment of the 44th District Court, and his rights of recovery thereunder, the same were subordinate to the remaining provisions of Title 91 on Limitation, of which that Art. 5541 is a part, and not in opposition thereto or in derogation thereof.

In this instance, with regard to the majority holding of the United States Circuit Court of Appeals, it is here asserted and contended that these petitioners established their claims to said property by limitation regardless of

and independently of any claim to said propery they may have had under the judgment of the 44th District Court.

The Court in reversing this case feli into error in confusing the Probate Article No. 3292 of Vernon's Civil Statutes (Tr. pg. 269) with Art. 5541. It has been held that these are separate and distinct articles, not related, and that a recovery cannot be had under one because of the other, nor can a recovery be barred under one because of the other. In the case of *Pollock vs. Wuntch*, 116 SW (2) 796, it is held affirmatively that Art. 3292 is a Probate Article, and that Art. 5541 is not a Probate Article, but one for the District Courts, and does not apply in the Probate Court, each relating to a different state of facts and a different provision and application of the law.

The facts with regard to the pleas of limitation were heard and determined by the trial Court, and its judgment and decision thereon are binding on appellate Court with regard to such fact findings. That court not only found that the necessary requirements had been met to perfect limitation, in their holding of said premises, but that respondent Margaret Christiansen had not exercised the diligence required of her to discover the same, and that she had not shown that she could not sooner have discovered the acts of these petitioners in perfecting their title by limitation, in their holding of said premises, byt the exercise of reasonable efforts to do so. In fact, this entire record shows that neither Alfred Christiansen nor Mar-

garet Christiansen is shown to have exercised any diligence at all of any kind or character, though both are shown to have known of their Aunt Allette living in Dallas all these years.

In the first place, the judgment of the 44th District Court was a final judgment, not shown to have been void, but at most voidable, and, therefore, not subject to collateral attack in the United States District Court or in any other Court. It was only subject to direct attack in the Court in which it was rendered. This proposition of law is so fundamental that citation of authorities is unnecessary. See, however, 25 Texas Jurisprudence, pages 696, 697 and 770, and cases there cited. This suit clearly was a collateral attack upon a final judgment of another Court.

The three points upon which the majority decision of the United States Court of Appeals was predicated are so intermingled that a few authorities will be cited and discussed showing their fallacy, and also sustaining the Specifications of Error here asserted by petitioners.

In *Mauritz vs. Thatcher*, 140 SW (2) 303, and in *Vaughn vs. Keisling*, 150 SW (2) 436, in both of which cases the Texas Supreme Court refused a writ of error, a like suit between co-tenants or tenants in common was filed by one against others, and limitation plead as a defense. The Trial Court found against the plaintiff and in favor of defendant on the defensive pleas of limitation. These

decisions were affirmed on appeal, and these rules laid down:

> "The jury having found on what we deem to be sufficient evidence that the two lots in controversy have been claimed, used and occupied by appellee, either in person or through tenants, for a period of ten years prior to filing of this suit, the question then to be determined on this appeal is whether the acts of appellee, in his assertion of his claim to said lots, were sufficiently open, notorious and inconsistant with the title to then owners thereof, under all the circumstances in the case, to raise inference of notice to the record owners that his claim thereto was hostile to their interest or from which the jury might rightfully presume such notice.
>
> "limitation upon an adverse possession in a case of this kind begins to run from the time of such notice of the tenancy. *It is not necessary, however, that an actual notice of an adverse holding and disseisin be given to the co-tentant or owner. Such notice may be constructive and will be presumed to have been brought to the co-tenant or owner when the adverse occupancy and claim of title to the property is so long continued, open, notorious, exclusive and inconsistent with the existence of title in others, except the occupant, that the law will raise the inference of notice to the co-tenant or owner out of possession, or from which a jury might rightfully presume such notice.*
>
> "It is held that reputation of the claim of a cotenant and notice thereof may be shown by circumstances and that a jury may infer such facts from

a long continued possession of the land under claim of ownership and non-assertion of claim by the owners.

"Since the jury and the trial judge have, upon sufficient evidence, resolved not only the issue as to the appellee's claim, use and occupancy of the two lots in question for the statutory period of time, but have also resolved the issues as to the sufficiency of the notice of his claim of ownership thereof to the record owners, regardless of whether we would have decided these issues in the same manner, the Trial Court's findings on these issues are conclusive and binding on this Court, and appellant's contention in this respect must be overruled."

The celebrated case of *Cryer vs. Andrews*, decided by the Supreme Court of Texas in 1837, (11 Tex. 170), has been often followed, but never overruled nor modified. There a suit for partition of an estate was filed and judgment obtained therein, and the estate partitioned. One of the joint owners, Mildred Cryer, was left out entirely, and she subsequently brought suit to recover her portion. The defendants plead limitation. When this case reached the Supreme Court of Texas, that Court held that judgment of partition was a nullity insofar as was concerned and not binding on her, but also further held:

"Inasmuch as this partition was a notorious act of ouster, the other parties claiming the whole of the land, to the exclusion of plaintiff, it would on general principles, as against a citizen not laboring under disability, operate as the commencement of prescription in favor of all who held adversely under such de-

> cree; and possession under it, accompanied with the circumstances enumerated in the statute, would ripen into a bar against a joint owner thus disseized." See *Gaddis—vs— Junker*, 29 S. W. (2) 918, 919.

Limitation in favor of these petitioners began run from the time Alfred Christiansen had notice of their adverse holding against him, but such notice did not have to be actual notice, and there is no better determined principle of law than that limitation would run from the time Alfred had discovered such adverse holding by these petitioners, or by the exercise of reasonable diligence could have discovered the same. This precise question was raised and adjudicated in the case of *Kouri vs. Kelton*, 178 SW (2) 712, writ of error refused by Texas Supreme Court, where it was asserted that limitation could not run against a co-tenant unless he had actual notice thereof. This opinion holds that actual notice is not necessary to predicate limitation, but that same may be shown by circumstances of adverse holding:

> "Though it is well settled that the tenant in common out of possession must have notice of the adverse claim of his co-tenant in possession before the statute of limitation begins to run, it is settled that the other need not give actual notice to his co-tenants. Sufficient notice may result from conduct of a character such as to leave no doubt to an observer that the exclusive right of enjoyment is asserted."

This doctorine is fully discussed and many supporting cases cited in the case of *Vaughn vs. Keisling*, 150 SW (2) 436.

In the case of *Sherman vs. Sipper*, 152 SW(2) 319, the Court says

> "Statutes of limitation have long been a part of our laws. They are regarded with favor. They compel the complaining party to assert his claim within a reasonable time. This rule is based upon sound public policy. It prevents a party from asserting a claim after a certain period of time, when perhaps the evidence rebutting such claim should be lost or destroyed. The effect of such statutes of limitation is wholesome, and they are found in all enlightened systems of jurisprudence. They furnish the means of giving security and stability to human affairs, and are a protection to property rights. They compel a party to be active in asserting his right; and they punish him for failure to do so within a reasonable time.
>
> "Equally well settled is the rule that where a person has a right in property, and he claims fraudulent statements were made concerning the title to such property, when the records relating to such title are open to him he must exercise reasonable diligence to discover such defect; and if by the exercise of such diligence he could have discovered such defect, and would have known of his rights, he is held to have known of it. and limitation will run against his claim from the time he could have made such discovery by the exercise of ordinary diligence."

In *Cowden vs. Limpia Royalties Co.*, 109 SW(2) 992, the Court says:

> "It has been steadily held that mere want of knowledge by the owner of an injury to his property does not prevent the running of the statute. It is the law

> of this state that neither fraud nor the ignorance of its existence will prevent the statute of limitations from running. The ignorance which effects such a result must be attended with such concealment of the fraud as will prevent its discovery by the exercise of reasonable diligence."

In the Motion or Petition for Rehearing in the United States Circuit Court of Appeals, these petitioners called attention to the fact that they invoked all of Title 91 of the Texas Civil Statutes which relates to Limitations. While Art. 5541 is a part of that Title and has always been so, there is another article thereof, being Art. 5513, which is as follows:

> "Whenever an action for the recovery of real estate is barred by any provision of this Title, the person having such peaceable and adverse possession shall be held to have full title, *precluding all claims.*"

In *Latta vs. Wiley*, 92 SW. 438, it is held that when the possessor of land has established facts proving 10 years limitation, such defense vested full title in him.

> "When the period of limitation has fully run, while there is adverse possession of the land, this gives title to the adverse possessor which he may assert against the world.
>
> "After title has been aquired in this manner it is not incumbent upon the owner to do anything to give notice of such title. There is no principle of law which will take from one thus invested with full legal title to the land, who has done nothing forbidden, nor ommitted anything enjoned by the law for the pro-

tection of others, his property and bestow it upon another."

In *Burton's Heirs vs. Carroll*, 96 Tex. Supreme, 72 SW. 582, after quoting Art. 5513, our Supreme Court of Texas says:

> "By the plain terms of the statute the continuous, peaceable, adverse possession of land for 10 years, claiming title thereto, conferred upon defendants in error 'full title': that is, all the title which eminated from the state vested in defendants in error as against the claims of any and all persons. (Citing previous Supreme Court authorities.)
>
> "The decisions of our Court here cited, as well as others, uniformly hold that the effect of the above quoted statute is to vest in the possessor who has complied with statutes of limitation, a full and complete title to the land."

These basic decisions of our Supreme Court of Texas have been consistently followed by our courts, showing that they have taken into consideration the effects of the defense of limitation, under Title 91, as it affects every other holding thereunder, and as against "all the world". This certainly includes any claim or holding under Art. 5541, which is a part of the title on limitations.

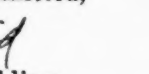
The attention of the United States Circuit Court of Appeals was directed to all of the errors herein complained of in petitioners motion for rehearing in this cause in said Court, which is a part of the transcript of the record herein. (Tr. pg. 27c)

CONCLUSION

If the decision of the Honorable United States Circuit Court of Appeals, and held by its majority, but rejected by the able minority opinion herein, be permitted to stand, it will mean, although Art. 5541 is a component part of Title 91 on Limitations, yet it is not to be governed thereby, but it is contrary to all the rest of that title superior and thereto; that although the Courts of Texas have held that when title has been perfected by limitation, it is a perfect title from the sovereignty of the soil into the claimant, not only as against the record owner who has negligently failed to assert his claims within the statutory period, but also as against all the world.

Wherefore, it is respectfully submitted that Writ of Certiroari should be herein granted and this cause brought before this Supreme Court for its consideration and determination; and that upon hearing hereof the judgment and decision of the United States Circuit Court of Appeals herein be reversed, this question hereinvolved be settled, and judgment rendered for these petitioners.

Respectfully submitted,



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